DOCUMENT RESUME

ED 475 554 HE 035 799

TITLE	Intellectual Property Rights in E-Learning Programmes: Report of the Working Group.
INSTITUTION	Higher Education Funding Council for England, Bristol.
REPORT NO	HEFCE-R-2003/08
PUB DATE	2003-02-00
NOTE	49p.
AVAILABLE FROM	Higher Education Funding Council for England, Northavon House, Coldharbour Lane, Bristol, BS16 1QD England. Tel: 01170931-7317; Fax: 0117-931-7203. For full text: http://www.hefce.ac.uk.
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	College Faculty; Distance Education; *Electronic Classrooms; Electronic Mail; Fair Use (Copyrights); Foreign Countries; *Higher Education; *Intellectual Property; Online Courses
IDENTIFIERS	*England

ABSTRACT

This report is a good practice guide for higher education institutions on intellectual property rights in e-learning programs. The report includes model clauses that may be included in contracts at higher education institutions and incorporates comments from a previous limited "expert" consultation. It focuses on how to manage intellectual property rights in e-learning and on the relationship between institutions and their staff and students. It also examines provisions in employment contracts and provides examples and guidance. Emphasis is placed on: (1) dissemination of knowledge; (2) principles of ownership of intellectual property; (3) instruments of effective intellectual property right management; (4) using third-party intellectual property; and (5) collaboration with the private sector and international entities. Five appendixes contain a bibliography, supplemental information, and a sample consortium agreement. (Contains 17 references.) (SLD)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 475 554

February 2003/08
Good practice
Guidance for senior managers
This report is for information and guidance

This is a good practice guide for higher education institutions on intellectual property rights in e-Learning programmes, written by the working group set up by HEFCE, Universities UK and SCOP to investigate this issue. It includes model clauses that may be included in contracts at higher education institutions, and incorporates comments from a previous limited 'expert' consultation. Comments are invited by 1 May 2003.

Intellectual property rights in e-Learning programmes

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY HAS BEEN GRANTED BY
R. Kier
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
2A

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Report of the Working Group

HE03/09

© HEFCE 2003

BEST COPY AVAILABLE

HIGHER EDUCATION FUNDING COUNCIL FOR ENGLAND hefce

Table of contents

Preface 2

Executive summary 3

Introduction 4

Report of the Working Group 9
- Section A: Our reasoning 9
- Section B: The contractual principles 14
- Section C: Conclusions 16
- Section D: Definitions 17

Next steps 19

Appendices

Appendix 1: Bibliography and useful web-sites 20

Appendix 2: Summary of responses to invitation to submit evidence 22

Appendix 3: Model contractual clauses 26
- A: Members of staff
- B: Freelancers
- C: Students

Appendix 4: Summary of responses to limited 'expert' consultation 34

Appendix 5: Sample consortium agreement for multi-partner collaborative R&D projects 38

List of abbreviations

Preface

We all recognise that good management of intellectual property (IP) is critical for higher education to play its part in the knowledge-based economy. In the area of research, senior managers and IP practitioners are well aware of the issues, particularly relating to patents, that need to be addressed to generate and exploit the wealth of IP created in higher education (HE). Most recently, the Association for University Research & Industry Links (AURIL), Universities UK (UUK) and the Patent Office have published an important report 'Managing Intellectual Property' to set out the strategic dimensions to IP management.

Legally, IP produced in the course of employment belongs to the employer, but, traditionally, individual members of academic staff in HE have controlled the IP in their publications. This academic freedom is very important for the dissemination of knowledge, which is a primary purpose of HE. However, increasingly, universities and colleges are seeking to exploit their teaching expertise, to reach out to new types of students across the globe and generate additional income, through e-Learning ventures. And to do so, institutions need sensible policies and practices for managing the IP represented in e-Learning materials, distinguishing these from publications and other academic outputs more generally. This issue was raised by the HE sector in responding to the consultation on the HEFCE's proposals for the e-University. In response, HEFCE, Universities UK and the Standing Conference of Principals (SCOP) set up our working group.

Our group agreed that a critical dimension to the distinction between e-Learning and other academic materials is that a journal article is usually created by the will of an individual or group of individuals who wish to communicate their area of expertise, while e-Learning materials, in contrast, are usually created at the prompting of, or in agreement with, the institution. This distinction and the necessary policies and practice to support the strategic management of IP to advance and exploit e-Learning are the focus of our report. We hope that our report meets the requirements of HEFCE, Universities UK and SCOP and the need for advice identified by the sector.

Sir Brian Fender
Chair of HEFCE/Universities UK/SCOP Working Group on intellectual property rights in e-Learning programmes

January 2003

The information contained in this Report is intended to be used as general background information and is not to be relied on as definitive or comprehensive guidance in any particular circumstances. Higher education institutions are urged to seek their own legal and professional advice on any employment law or intellectual property law issues relevant to their own circumstances before acting on any guidance contained in this Report. Neither HEFCE nor any contributors to this Report shall be liable to any person for any claims, costs, proceedings, losses, expenses, fees or damages whatsoever arising directly or indirectly from any error or omission (whether negligent or otherwise) contained in this Report.

BEST COPY AVAILABLE

Intellectual property rights in e-Learning programmes
Report of the Working Group

To	Heads of HEFCE-funded higher education institutions/Heads of HEFCE-funded further education colleges/Heads of universities in Northern Ireland
Of interest to those responsible for	Intellectual property rights, Employment contracts
Reference	2003/08
Publication date	February 2003
Enquiries to	Pippa Thompson tel 0117 931 7311 e-mail p.thompson@hefce.ac.uk

Executive summary

Purpose

1. This is a good practice guide for higher education institutions on the management of intellectual property rights (IPRs) in e-Learning programmes.

Key points

2. HEFCE and Universities UK announced in April 2001 (HEFCE circular letter 07/01) that they had agreed to establish a working group on IPRs in e-Learning programmes, alongside the e-University project, to advise institutions on best practice. This guidance has been written by that working group.

3. The report focuses on how to manage IPRs in e-Learning, on the relationship between institutions and their staff and students, and examines provisions in employment contracts. It provides exemplars and guidance, including model clauses to use in employment contracts at Appendix 3.

4. In October 2001 the working group sought evidence from the HE sector and other interested parties, and a summary of responses from the consultation is at Appendix 2. In September 2002 the working group undertook an additional consultation with selected expert bodies on an early draft of this report. A summary of response is included in Appendix 4.

5. The working group did not advise on exploitation of e-Learning programmes in overseas markets, but may do so if a second phase of work is undertaken.

Action required

6. Comments are invited by 1 May 2003.

Introduction

7. In October 2000 the HEFCE consulted on the Business Model for the e-University. The e-University project had been conceived as a UK response to the global trend toward internet-based learning and teaching. Higher education institutions (HEIs) responding to that consultation said that further clarification was needed about the implications for the control of intellectual property rights in e-Learning. HEFCE and Universities UK announced in April 2001 (HEFCE circular letter 07/01) that they had agreed to establish a working group on IPRs in e-Learning programmes, alongside the e-University project, to advise institutions on best practice.

8. The Working Group had the following remit.

The Working Group has been established to draw up best practice guidance to assist HEIs in devising effective practices and procedures in handling IPRs in e-Learning programmes, building upon the experience and expertise that already exists within the sector. In the light of the above, the Working Group is asked:

a. To commission or collect relevant evidence.
b. To appoint advisers or seek expert advice as necessary.
c. To report to HEFCE, Universities UK and SCOP by end of August 2002.
d. To consider and advise HEFCE, Universities UK and SCOP, on responses to the consultation on the report and finalise guidance for publication by end December 2002.

It is not envisaged that the Working Group should consider the issues of rights management raised by the delivery of e-Learning Programmes around the globe, although it may be asked to extend its remit into a second phase to address this.

9. The Working Group had the following membership:

Sir Brian Fender, Chief Executive, HEFCE (Chair)
Professor Aldwyn Cooper, Pro Vice-Chancellor, University of Glamorgan
Professor John Enderby, University of Bristol
Dr Philip Graham, Queen's University Belfast – Executive Director, AURIL
Richard McCracken, Rights Manager, Open University
Stephen Marston, Director for Institutions, HEFCE
Dr Tim Mead, The Registrary, University of Cambridge
Charles Mitchell, Cumbria College of Art and Design
Anthony Murphy, The Patent Office
Professor Charles Oppenheim, Loughborough University (Special Adviser)
Bill Trythall, University of York – Convenor, Association of University Teachers' Working Group on IPRs
Professor Graham Zellick, Vice-Chancellor, University of London
Observers: Joanna O'Brien, Universities UK, Dr Malcolm Read, JISC

Secretariat: Alice Frost and Pippa Thompson, HEFCE

10. We are particularly grateful to Professor Charles Oppenheim and to Emmanuella Giavarra for their assistance in preparing our report.

11. In October 2001, as a first task, we sought evidence from the HE sector and other interested parties (HEFCE circular letter 13/01). In particular, we asked for views on the key issues we had identified (discussed further below) and exemplars of best practice and guidance that are already used effectively in HEIs. At the same time, we compiled a bibliography of key references, to which respondents to the consultation have added (the revised bibliography is at Appendix 1).

12. Appendix 2 is a summary of responses to the consultation. The main thrust of responses was that institutions perceived IPRs in e-Learning programmes to be an increasingly important topic. Few institutions felt that they had in place all the policies and procedures that could enable them to exploit e-Learning effectively. Hence the Working Group's work was welcomed and considered to be well timed. Responses to the key issues we had raised were (our issues are given in italics):

a. ***Dissemination of knowledge.*** *HEIs need to be able to pursue their core mission of creating and disseminating knowledge. Individual academics, other staff and students similarly need to be able, and encouraged, to use and develop their intellectual outputs throughout their careers. Staff also need to protect their reputations, enshrined in the moral rights of authors. And similarly HEIs need to ensure that the learning programmes they devise maintain their intellectual integrity, even when they are customised or developed for overseas or proprietary markets. How can we preserve these academic and intellectual freedoms while at the same time ensuring the UK HE exploits its e-Learning assets effectively in a global market?*

Respondents felt that institutions should be able to own and exploit IPRs in e-Learning programmes. e-Learning is seen as an increasingly important mode for delivering the core learning and teaching mission of the university domestically, as well as a potential revenue earner through overseas and corporate provision. Both the institution and the member of staff may benefit from effective exploitation. On the other hand, respondents considered that it was important to respect the rights of authors in learning programmes.

b. ***Principles of ownership of IPRs.*** *Effective management of IPRs entails that the various parties involved have sufficient rights to do what they need to do with intellectual products. For example, staff need to refresh and update learning materials and use these in their teaching. HEIs need to secure and maintain high quality provision for their students, and exploit materials in global markets to generate revenue. Staff invest considerable time in creating learning materials and conventionally have benefited from exploitation of these, for example in textbooks. e-Learning programmes are complex and expensive to devise, and HEIs are likely to have to invest heavily to develop and support them. Can rights in intellectual*

BEST COPY AVAILABLE

property be managed to meet the needs of both staff and HEIs? Should ownership, and reward, in intellectual products reflect investment?

Generally, respondents felt that IPRs can be managed to meet the needs of both staff and HEIs, provided the distinction is made between ownership and authorship. The importance of reward systems for different types of staff and for different media was emphasised.

c. ***Instruments of effective IPR management***. *What are the major instruments for managing IPRs (employment contracts, intellectual property agreements, and so on)? What other policies, procedures and practices need to be put in place to ensure effective IP management in an HEI?*

The majority of respondents emphasised the importance of appropriately drawn employment contracts as the effective means for managing IPRs. Policy statements on IP management were also supported as effective instruments.

d. ***Using third party IP***. *e-Learning programmes are complex and it may be necessary to import learning and other 'objects' from third parties into materials, and also to link and provide access from the programmes to supplementary materials and e-Libraries. What challenges are posed by the use of this kind of third party material, and how can these challenges be managed effectively in the HEI?*

The majority of respondents felt more comfortable with handling the inclusion of third party IP in e-Learning programmes and did not feel extensive further guidance was needed. (However, our subsequent consultation with the 'expert' bodies in paragraph 19 contradicted this view.)

e. ***Collaboration with the private sector and internationally***. *Many HEIs will consider collaborations with private sector partners and/or overseas HEIs to provide e-Learning. What challenges are posed by such partnerships? How can these be managed effectively? How satisfactory has experience been to date of such partnerships?*

Private sector and international collaborations over e-Learning are a fairly new phenomenon and hence it was considered premature to identify good practice. Such arrangements as do exist are likely to be commercially confidential.

13. In the light of these responses, the Working Group decided to focus on the means of managing IPRs in e-Learning, especially the relationship between institutions and their staff and students, and particularly upon provisions in employment contracts. This report provides clear and specific exemplars and guidance, which HEIs can adopt, or not, or amend, as they wish. We recognise that there may be other ways of managing IPRs effectively, and our exemplars are not the only possible methods, but we believe that they are fit for purpose.

Appendix 3 has model clauses that might be used to implement our conclusions in arrangements with staff and students, if any institution so chooses.

14. We were aware that Universities UK, AURIL and the Patent Office had established a project on IP management in HE, which would focus on the exploitation of IP from research. We were kept in touch with the work of that group through cross-membership. We considered that project's report 'Managing Intellectual Property: A guide to strategic decision-making in universities' (published AURIL/Universities UK, 2002) and discussed our principles and conclusions with the sponsors of that work. Many of the principles and practices of rights management in learning and teaching are similar to those for research, and hence we determined not to duplicate the work of the UUK/AURIL project. The UUK/AURIL report presents clearly the case for the importance of IP management to generate and transfer knowledge, both for public social and economic benefit and for the purposes of income generation by the institution.

15. The UUK/AURIL report set out extensively the case for strategic management of IP and how this may be conducted effectively in the institution, including possible approaches to reward systems. These issues are therefore not covered extensively in our report. Copyright management is an important component to the strategic management of IP in an institution and needs to be taken seriously – increasingly seriously given the changing nature of learning. In an institution with significant aspirations in e-Learning, copyright management will need to be placed at the centre of the institution's governance.

16. Although many HEIs did not feel that they needed extensive guidance on handling third party materials in e-Learning programmes, we feel that the existing legal provisions to cover this are not always fully understood and observed in institutions. In 1998 the Joint Information Systems Committee (JISC) issued guidance on this matter produced originally for the Teaching and Learning Technology Programme (TLTP). This guidance covers extensively issues related to handling IPRs in third party materials and is accessible at www.ukoln.ac.uk/services/elib/papers/supporting/#other. Years have passed since this guidance was updated, so rather than commend them to readers, we have drawn on the guidance in the paragraphs in our report that discuss collaborative arrangements.

17. We were aware of the establishment of the e-University and the role that it may take in assisting HEIs to exploit their learning programmes in overseas markets. We also knew that some HEIs had progressed with their own commercial or overseas partnerships for overseas exploitation. And we were aware that UUK has established an Observatory on Borderless Education, which, among other matters, will advise institutions in due course on overseas markets and IP management. We determined therefore that we should not attempt to provide advice at this stage on exploitation of e-Learning programmes in overseas markets: given that good practice is only beginning to emerge, information on such practice is likely to be confidential, and anyway investigation of overseas market would be expensive and time-consuming. In the Next Steps section of this report, we set out issues that we feel need to be explored in this area and which could form a second stage to our work, subject to the wishes of HEFCE, UUK and SCOP.

18. We also felt that it would not be timely to provide guidance on how to go about forming partnerships with the private sector to exploit learning programmes. Again, information on existing exemplars is likely to be guarded for commercial reasons, and it is too early for best practice to have emerged. Some of the insights from the UUK/AURIL report on collaborations might usefully be applied to e-Learning. We set out in Next Steps issues for further consideration.

19. At the end of our work, we consulted a number of 'expert' bodies on the contents of this report. The aim of this limited consultation exercise was to test out our thinking and the more technical aspects of our recommendations on organisations with particular expertise or interest in the subject. We had responses from the following:

Association of University Teachers (AUT)
The Education Institute of Scotland
Learning and Teaching Support Network (LTSN)
Learning and Skills Council (LSC)
National Association of Teachers in Further and Higher Education (NATFHE)
National Union of Students (NUS)
The Publishers Association
Standing Conference of Principals (SCOP)
Ufl
Universities UK
UK eUniversities Worldwide.

20. A summary of responses to that limited consultation is at Appendix 4. We considered all the points made, although we did not always agree with them. Some responses inevitably presented the different perspectives of different groups on the complex issues which we tackled, and we tried to recommend a satisfactory way forward that addressed the interests of all parties. The consultation was particularly useful in helping us ensure that there was consistency in approach across the report and the model clauses, as our respondents picked up ruthlessly any inconsistencies in our argument. It also highlighted, in contradiction to responses on our early call for evidence, that more guidance was felt to be needed on handling third party materials. (JISC is intending to provide updated guidance on this issue shortly.) Some respondents requested more detailed guidance on points of law, particularly definitions, which we think may be better handled through reference by them to a lawyer or legal text.

21. We were grateful for all the contributions received in consultation. This report nevertheless remains our own work. We are aware that the e-Learning field is changing rapidly and this may have radical implications for the way in which learning and teaching is conceived and delivered in future. Hence we stress that our conclusions and recommendations may need to be revisited fairly soon to stay abreast of developments.

BEST COPY AVAILABLE

Report of the Working Group

Section A: Our reasoning

What can be protected?

22. The development of e-Learning materials invariably involves the creation of new IPR. Much of this will be copyright (in particular, there will be copyright in any new computer programs or learning platform systems created, and in new text, image, moving image and sound recorded materials incorporated into the e-Learning material), but there are other forms of IPR that may well be created. The topic of patenting of computer-controlled processes is a very controversial one, with the UK holding a harder line than the US (in that it is more difficult to obtain such patents in the UK than it is in the US). It is therefore possible that in some cases e-Learning materials may be patentable in the US, or indeed, that if sold in the US, might infringe a pre-existing patent there. Finally, in some circumstances, such as where e-Learning materials include video footage of a lecturer teaching, or of (say) a theatrical or ballet performance for illustration purposes, Performers' Rights are involved. The Farrington Report (see Appendix 1) provides a helpful discussion on IPR issues in HE generally, including software development. Furthermore, some of the materials may be the subject of patents.

23. It is worth stressing that anyone creating e-Learning materials needs to be aware of both sides of the issue – that they are creating IPR materials, and that they are potentially infringing IPR by making or using materials or systems that are already subject to IPR owned by a third party. This report focuses on the creation of IPR in e-Learning and how to both protect the IPR once created and how to sort out ownership issues. Nonetheless, it is crucial that those developing e-Learning materials are aware of the risks involved in using third party materials or systems, and take the necessary precautions to avoid an infringement action.

24. This report focuses on copyright, because we believe that HEIs have generally developed clear policies regarding credit and reward in patented inventions. Our fundamental assertion is that a similar clear approach should now be taken in regard to copyright and related rights in e-Learning materials, including software, systems and content.

Dissemination of knowledge

25. It is important not to allow IPR to become a major inhibiting factor in the dissemination of knowledge. There is a risk that an over-prescriptive approach will inhibit academics from experimenting with novel methods of dissemination or collaboration. None of our recommendations are intended to interfere with the dissemination of knowledge.

Ownership of IPR

26. There are three issues here. The first are the basic rules for materials created in the course of employment whilst the member of staff who creates them is in employment; the second is what happens when he or she leaves to take up employment elsewhere. The third, and one of the most important, is the fact that while most scholarly materials and traditional teaching materials have been typically created by a single academic, the trend for e-Learning materials is for such materials to be created by a team.

27. In statute law, staff creating e-Learning materials on instruction from the employing HEI do not gain IPR in the materials they create. Because this is material created in the course of their employment, the HEI automatically owns the IPR in what they create. Nonetheless, it would be helpful if this was made explicit in their contract of employment. Recommendations for model clauses in the contract are at Appendix 3. If students are involved in the creation of e-Learning materials, they should be treated in a similar way to staff by the use of a contract, as in when they register or renew their registration. The contract should, however, in this case be voluntary – the student should not be obliged to sign it in order to undertake their studies. The HEI should stress to students the benefits of signing such a contract: the fact that commercial exploitation will be undertaken by those more experienced in such things than the student, and that the student will get a fair share of any net income generated. We do not believe that a compulsory clause imposed on all students would be upheld by the courts.

28. The issues raised when a member of staff leaves the employment of the HEI are considered in paragraphs 34-35.

29. Materials created by a team pose IPR problems over and above the already difficult issues regarding copyright ownership in materials created by an individual. Ownership issues become more acute when the materials have been developed jointly by a number of people in more than one HEI.

30. The technology employed in e-Learning materials, and the collaborative ventures that involve such materials are developing rapidly, and so our guidance may quickly become out of date.

31. HEIs should allow for the possibility of reversion of rights if, should the HEI choose not to exploit the materials commercially, the individual or team that developed the materials wishes to take on the exploitation of the materials. Negotiations should be entered into in good faith and should be based on the premise that the HEI should not unreasonably refuse the individual or the team the IPR if the HEI has no interest in exploiting the materials, but we do not recommend specifying the time after which staff have a right to acquire IPR. Each case should be treated on its own merits, with appropriate arbitration procedures in place in case of disagreement. In return for the acquisition of the IPR, the member of staff should always grant the HEI and its authorised users a royalty-free licence to use the materials for administrative, educational, teaching or research purposes. Any agreement regarding

BEST COPY AVAILABLE

reversion should include a clause that forbids the individual to offer the material in any way that the HEI in its reasonable opinion deems to be competitive to its own activities.

32. The contract of employment of all staff involved in the development of e-Learning materials should make it clear that the employing HEI is the first owner of the IPR in exploitable e-Learning materials created in the course of their employment. We recommend that in the first instance the IPR is owned by the HEI, but the academic or other members of staff involved have a royalty-free licence to use the materials within the HEI. If there is net income generated, then an equitable income-sharing arrangement should be concluded. The HEI should always be prepared to waive copyright in any work or assign it back to those who created the work if it decides there is no prospect of commercial exploitation of the materials. The terms 'assign' and 'licence' are defined in the Definitions section. Further information about them can be found in Bently and Sherman's book (see Appendix 1).

33. Even where the HEI claims copyright ownership, any member of staff who has made a significant contribution may wish to be credited as the creator, and if so credited, should not be asked to waive rights under Chapter IV of Part I of the Copyright, Designs and Patents Act 1988. Accordingly, he or she should have the right to object to any significant amendment which is prejudicial to their reputation. However, it is for the HEI to make the decision whether to give such credit or not. It would be in the career interest of those involved to be named, and the HEI should be sensitive to this. Any member of staff who is named should have the right to request that if the e-Learning materials are now in their reasonable opinion so out of date, or so changed that continued distribution damages their reputation, then their name should be removed. If the individual does have their name removed, then he or she should have no further entitlement to any share of the profits that had previously been accrued. There could well be circumstances when the HEI wishes to amend the materials to suit its own particular requirements or to update the materials. Ideally, it would co-operate with any staff named on the materials if the changes are significant, but if it should find that it was not feasible to do so, then it would be at liberty to make the changes anyway, provided that the amended material included indications that named staff were not responsible for the amendments. In view of the potential impracticability of contacting everyone named, the contract of employment should make it clear that the HEI always has the right to make the final decision regarding amendments, and that it need not consult staff over minor amendments. This is a difficult and controversial area, and a balance has to be struck between the ability of the HEI to make minor necessary changes easily and speedily, and the need to ensure the interests of staff are respected.

34. Should staff be allowed to take physical ownership of materials they created if they move to another post? The problems involved become acute if several members of staff were involved in the creation of the e-Learning materials. We commend the Open University (OU) approach. Staff are given certain rights to use extracts from course materials when they leave, and the contract of employment governs such rights, but each case is negotiated between the member of staff and the OU on its merits. A reasonableness test should apply. We also strongly recommend that the contract of employment make explicit the arbitration procedures that should be followed in the case of disagreements over this issue, or other contentious issues relevant to IPR in e-Learning materials.

35. Whatever the negotiated settlement, one thing should always be explicit in the contract of employment: the ex-member of staff is not entitled to use any materials subsequently significantly updated by their previous employer. Equally, the previous employer will not be permitted to exploit any e-Learning materials that the person creates in their new employment.

IPR ownership of materials developed jointly by several institutions, or that include third party materials

36. The model suggested here is based on the JISC/TLTP guidelines (referenced in Appendix 1). It is vital that the formal written agreement of consortium members to the assignment of copyright and ownership of materials is obtained at the start of any joint project. The division of benefits and liabilities arising from this and other activities of the consortium need to be clearly defined. We have provided a model for such an agreement at Appendix 5 which is based upon Appendix II of the JISC/TLTP guidelines and provides possible terms that cover such issues, as well as related matters. The details will vary according to project goals and objectives, and the nature of existing arrangements between the partners. In all cases, it is strongly recommended that the partners take legal advice on the Agreement. Whatever the precise wording, the following issues need to be covered in the Agreement:

a. The goals and objectives of the consortium.
b. How the consortium's funding will be allocated and accounted for.
c. What happens if a consortium partner leaves the consortium (or is asked to leave)?
d. Who owns the copyright in the software and content of the materials produced?

37. In addition, the JISC/TLTP document provides advice on possible structures for commercial exploitation of the materials produced, on the use of trademarks, and on obtaining copyright clearance from third parties. It also provides model licences for purchasers of the materials.

Commercial exploitation

38. If a third party is involved in commercial exploitation of materials, then it should deal directly with the HEI as the owner of the IPR. It is important that staff understand that because of the contract of employment, they need to think carefully about any licence or assignment deals with third parties. It is particularly important that academic authors think carefully about e-Learning possibilities before assigning to publishers, or exclusively licensing to them, rights in textbooks, journal articles and the like where it is anticipated that these might be converted into e-Learning materials. This requires a mixture of education and persuasion. The UUK/AURIL guide mentioned in paragraph 14 of the introduction will be of use in this process. We return to this topic in paragraphs 48-49.

39. Not all HEIs have suitable experience in negotiating deals with third parties, and the e-University or some other body may wish to develop guidance or act on behalf of individual HEIs.

Recognition and rewards

40. In general, if an HEI plans to exploit materials commercially, then it should follow its own particular practice for the sharing of net income (in other words, after deduction of all costs), and this should be made explicit in the contract of employment. The UUK/AURIL guide may inform HEIs in deciding upon practice if this has not been determined within the HEI already.

41. It should be up to the employing HEI whether or not it credits those who make a significant contribution in the course of their employment to the e-Learning materials. If it does choose to do so, it should credit individuals in a fair and equitable manner, and should provide for arbitration in the case of dispute, whilst reserving the final decision to itself. See paragraph 33.

42. In some circumstances, it may be appropriate that a special fee is paid to a member of staff for their contribution to the e-Learning materials (in addition to, or instead of, a share of net income depending upon the role of the member of staff and/or the structure of rewards in the HEI). It would be up to the HEI to decide the appropriate levels and the mechanism for such payments, which might be part of the regular salary review system of the HEI. We recommend flexibility in such circumstances; for example, whilst for most purposes a standard contract outlining the rewards is appropriate, if significant profits are expected there should be leeway to negotiate different terms.

Freelancers

43. Freelance individuals or organisations may be involved in the development of e-Learning materials. In all cases, they should be required to assign copyright to the HEI that commissions the work. Suggested contractual terms are provided in Appendix 3.

Protecting copyright

44. Sorting out ownership and rights to exploit is only half the battle. Another issue is who is responsible for policing the web to ensure that copyright in e-Learning materials is not being infringed. The HEI, together with any commercial partner, should be responsible for this, although of course individual authors will also be active in ensuring the fruits of their labour are not being abused. Digital rights management (DRM) systems ought to be used to protect the copyright of the materials. A DRM system is any hardware or software that prevents access to digital materials to anyone other than authorised users; it includes authentication systems such as Athens as well as systems for accepting credit card payments for access to materials. Further details about DRM can be found in Rosenblatt, Trippe and Mooney's book (see Appendix 1). In addition, a clear statement of copyright ownership, and an explanation of what may or may not be done with the material, should

BEST COPY AVAILABLE

appear on every piece of e-Learning material. Forthcoming legislation, due by March 2003, will make it an offence to bypass or deactivate either DRM, or a statement of copyright ownership, with the intention to infringe or conceal infringement.

Problems with collaborative projects

45. In the case of collaboration, questions arise regarding the relationship between the parties, the ownership of the materials created and the sharing of rewards. In the case of international collaboration, a further issue is what country's law applies to the agreement. International collaboration can take four forms: joint development; joint production; selling e-Learning materials into overseas markets using an agency of some type; and using overseas collaborators for modifying existing materials to tailor to overseas markets.

46. These collaborations, whatever form they take, raise difficult issues, especially as different countries have different approaches to the creation and exploitation of IPR. We therefore strongly recommend that the parties seek legal advice on such matters, and do not leave it to goodwill in the hope that no disputes arise.

Existing contracts

47. We are aware than some HEIs already have contractual arrangements that cover IPR issues associated with e-Learning materials. We recommend that those institutions review their existing contracts in the light of this report.

Education and trai ıing of staff

48. It has become clear from the evidence and comments presented to us that there is at present insufficient staff training on IPR issues. We recommend that all staff, not just new staff on induction courses, should receive training on the importance of protecting their own IPR, the importance of IPR to their HEI, and respecting third parties' IPR. It is not just a case of educating about IPR in general, but also about how to deal with approaches from publishers and similar third parties.

49. It also became clear to us that there are training issues associated with the liabilities and responsibilities of staff and HEIs. Staff probably need warning that issues of public liability, defamation, libel and breach of contract, and associated insurance, could come up. The UUK/AURIL guidelines are a useful source of advice on these matters.

Section B: The contractual principles

50. We have devised the following contractual principles to guide HEIs:

Principle 1. HEIs should be free to exploit (whether for financial gain or not) e-Learning materials created by their own staff in any lawful manner that the HEI sees fit, including direct exploitation, licensing or assigning the IPR in the materials to third

parties, or merging said e-Learning materials with other materials created within that HEI or elsewhere. For this reason, the contracts of employment for staff should make explicit that, subject to staff's rights outlined in Principle 5, the IPR in such exploitable materials where such materials have been created at the prompting of, or in agreement with the HEI, shall belong to the HEI. Where the materials fall into the category of 'personal' – as identified, for example, in Clause 16.4 of the post-1992 HEIs' contract of employment – the IPR remains with the individual, although the individual must abide by the HEI's requirements with respect to placing materials on the intranet or internet. Where there is disagreement or uncertainty as to the status of the materials, the matter should be subject to the HEI's arbitration procedures.

Principle 2. Nonetheless, to avoid any suggestion of restraint of trade of staff, HEIs should in their contracts of employment provide a royalty-free non-exclusive licence to any member of staff who created the e-Learning materials (or in the case of jointly developed e-Learning materials, to all those staff involved). This licence shall be to exploit such materials for their own *bona fide* teaching or research purposes only (in other words, not for commercial exploitation) for as long as such members of staff remain employed by the HEI. The contract of employment should also state that should the member of staff leave the employment of the HEI, procedures will be implemented for negotiation of the continuation of the licence. It should specify that such a licence would not be unreasonably withheld, and identify arbitration procedures that would be available. The contract should also make it explicit that if the member of staff leaves, he or she is not entitled to use any materials subsequently updated by their previous employer. Equally, the previous employer will not be permitted under the contract to exploit any updated materials the ex-member of staff creates in their new employment.

Principle 3. The contract for all members of staff should state that if, after an agreed period of time (to be negotiated between the staff and their employing HEI) following the completion of the creation of the e-Learning materials, the employing HEI has failed to exploit the materials and does not intend to do so in the foreseeable future, the HEI and the member(s) of staff should enter into good faith negotiations with a view to transferring the IPR in the materials to the staff while still licensing the HEI to copy materials for its bona fide purposes. (Comment: Exploitation takes many forms – see Definitions section – and could cover the use of materials in teaching students. The HEI should retain this right even if commercial exploitation rights revert to staff. And any reversion of rights to staff should be limited so as not to conflict with use by the institution.)

Principle 4. Contracts of employment with staff should make clear that they own the Performers' Rights in any video or other recording of their own lectures or presentations. Exploitation of such materials shall only be undertaken by the HEI following negotiation of a licence from the member of staff.

Principle 5. At present, other than in the case of inventors being named on a patent application, there is no statutory right to be credited on materials created while in employment. However, we encourage HEIs to name key individuals on e-Learning materials. These might be significant contributors and/or high-profile lead academics. It

will be necessary for HEIs to put in place compulsory arbitration to deal with disputes over naming and over sharing of rewards. However, we recommend that if people are credited, they should not be asked to waive moral rights, for example staff should only be credited if they contributed significantly, should have the right to object if someone is credited who they believe did not contribute significantly and should have the right not to have their name associated with materials. Although the HEI must have the final say over who is credited, and no member has staff has a right to veto another person being credited, we recommend that an arbitration process be available to resolve any disputes on credits.

We recommend that the broad principles that apply to the naming of inventors on patent applications should be extended to credit on e-Learning materials. It is recognised that there is a tension between updating and retaining names on materials that are updated over a period of time. Whilst it is not possible to lay down hard and fast rules on how to handle such matters, we recommend that HEIs should be sensitive to the wishes of those staff involved.

Principle 6. HEIs should develop schemes for providing special rewards for e-Learning materials along the lines of existing schemes for, for example, patented inventions.

Principle 7. We recommend that students (undergraduate and/or postgraduate) should be treated as far as is legally possible in the same way as staff, and should be offered the same training and protection that staff have, including contractual rights and revenue sharing. They should not be forced to accept such advice or contracts, but would be unwise to reject them. This is consistent with the UUK/AURIL guide approach.

Section C: Conclusions

51. Each HEI should develop a clear policy on IPR ownership, IPR exploitation, crediting individuals, and on rewards for commercial exploitation. HEIs may wish to draw upon the three sets of model contractual clauses in Appendix 3:

- clauses of employment for staff
- clauses for freelancers
- clauses for students.

52. HEIs should recognise the significant resource implications of e-Learning developments in respect of IPR, but take the opportunity to clarify their IPR policies in all materials, not just e-Learning materials. This is important because a traditional textbook contract with an academic may subtly change over time to cover e-Learning materials as well.

53. Part of the reasoning behind the e-University project was that smaller HEIs may not develop an extensive e-Learning portfolio but may nevertheless wish to produce one or two products in niche markets. We believe therefore that these may find it helpful to receive

BEST COPY AVAILABLE

assistance in the detailed handling of IPR matters. The JISC provides a Legal Information Service on a pilot basis described at www.jisc.ac.uk/legal. Its main focus is IPR and data protection. This Information Service could provide the basis for a legal advisory service of the type we are recommending. There may also be an argument for a collective body, similar or related to AURIL, to bring together staff with responsibilities for copyright management to identify and disseminate good practice.

54. We note that effective software for tracking ownership of IPR may be needed by HEIs. JISC is already undertaking work in this field as part of its work on Managed Learning Environments. In the future, JISC may advise on options for appropriate software for tracking IPR ownership.

55. The mode of production of e-Learning materials is developing rapidly and it is not certain that current methods will remain commonplace for long. It is therefore likely that the guidance in this report will have to be revised from time to time to reflect changes in technology and practice.

Section D: Definitions

56. The following definitions apply throughout our report:

- 'arbitration' is a process for negotiation to settle any disputes and which allows for differences to be reconciled. This is not necessarily a formal process through the courts. A robust and transparent internal process that is seen to be fair to all interests is the ideal; this means that it does not have to be an expensive or elaborate system.

- 'assignment' is, in this context, the transfer of IPR in action by one person (the assignor) to another (the assignee). Having assigned the IPR, the assignor has no further legal title in the IPR.

- 'commercial exploitation' is exploitation for financial reward, or an equivalent consideration. We recognise that there is considerable ambiguity in this term; for example, is material placed on a free-of-charge university web-site for 'commercial exploitation' as it may directly or indirectly lead to increased income for the HEI? We recommend that arbitration procedures be put in place to settle any disputes that might arise.

- 'e-Learning materials' are any materials created within an HEI that are **primarily intended** (whether by the HEI or by some third party) **to be used in digital form** by students at any level, for the purposes of any course of study those students are following. We recommend that this working definition of e-Learning materials is adopted by HEIs. We particularly draw attention to the fact that our definition excludes materials such as textbooks that might happen to be converted into digital form at a later date. However, we also recognise that the boundary between

e-Learning materials and other output produced by staff, including textbooks, is becoming blurred, and recommend our definition be kept under review by HEIs.

- 'exploit/exploitation' is offering the materials to students for use in courses, and/or selling or licensing the IPR in said materials, in return for payment or some other consideration. 'Exploitable materials' are any e-Learning materials capable of such exploitation.

- 'IPR' includes patents, trademarks (whether registered or not), design right, database right, copyright and confidential information/trade secrets. Patents, registered trademarks and registered designs are obtained only through a formal application process. Copyright, database rights and confidential information/trade secrets are created automatically without any formal process.

- A 'licence' is a formal authority to do something that would otherwise be unlawful. In this context, it refers to a licence by the owner of IPR to copy, adapt, etc e-Learning materials even though copyright law prohibits such copying without authorisation. Unlike assignment, the owner of the IPR remains its owner and, depending on the terms of the licence, may be able to continue to do whatever he or she likes with the IPR.

- 'materials' can include printed material, material on floppy disk, web-sites, online databases, CD-ROM, etc, and can comprise any combination of text, still images, moving images, sound, music on any medium, and might include hypertext linkages to other materials. In other words, the medium is irrelevant.

- 'staff' includes academic staff, research associates, technicians, or any other members of staff of the HEI who are employed under a contract of employment (whether fixed term or permanent). It does NOT include freelancers who do not have contracts of employment with the HEI, undergraduate students, or postgraduate students (whether taught or research based), unless the students have a contract with the HEI to undertake teaching duties. This broad definition of 'staff' applies throughout our report.

Next steps

57. You are invited to send any comments on this report by 1 May 2003 to:

Alice Frost
Head of Learning and Teaching
HEFCE
Northavon House
Coldharbour Lane
BRISTOL
BS16 1QD

58. The HEFCE, Universities UK and SCOP would particularly welcome views on whether the Working Group's remit should be extended to address issues related to the handling of IPRs in e-Learning programmes overseas. This second stage of the group's work might cover:

a. The nature of overseas activities, including:

i. The joint production of e-Learning programmes by UK HEIs and overseas collaborators.

ii. The marketing and selling of UK produced programmes to overseas markets.

iii. The modification of existing programmes to tailor these to overseas markets, possibly with overseas collaborators.

b. Differences in IP legislation internationally, as well as in cultural attitudes to IP, and the implications of these for joint working and for overseas marketing.

c. The value of partnerships – with the private sector and overseas HEIs – in overseas activities, and best practice in forming and sustaining partnerships.

Appendix 1

Bibliography and useful web-sites

Bibliography

American Association of University Professors (www.aaup.org) Statement on Copyright and Special Committee on Distance Education and Intellectual Property Issues: Suggestions and Guidelines Sample Language for Institutional Policies and Contract Language

Association of American Universities Research Libraries project:
Report of AAU Task Force on intellectual property rights in an electronic environment, Washington: Association of Research Libraries, 1994. ISBN 0918006-24-4

AURIL/UUK/Patent Office, *Managing Intellectual Property* 2002, (www.patent.gov.uk/about/notices/manip/index.htm)

L. Bently and B. Sherman, *Intellectual Property Law*, Oxford University Press, 2001

D. Farrington, *Intellectual property, the Internet and HE*, The observatory on borderless higher education report, April 2002

E. Giavarra and C. Oppenheim, 'EU Database Directive: some clarifications', SCONUL Newsletter, 1997 (12), 6-7

S. Harnad, The Harnad/Oppenheim 'solution' to the copyright crisis (www.ecs.soton.ac.uk/~harnad/Tp/resolution.htm#Harnad/Oppenheim)

JISC *Policy Approaches to Copyright in HEIs*, April 2000 (on web at http://strath.ac.uk/ces/projects/jiscipr)

JISC (www.jisc.ac.uk) guidelines for the UK HE funding councils on handling copyright: *Handling copyright: a guide to good practice for recipients of Funding Council programmes*; includes requirements for copyright in Funding Council funded work

JISC/PA reports on copyright issues (see www.ukoln.ac.uk)

JISC, *Copyright guidelines for JISC and TLTP projects*, eLib Study C1, 1998, ISBN 1 900508 41 9. Guidance for JISC and Teaching and Learning Technology Programme projects (see www.ukoln.ac.uk)

Murgitroyd & Company, *THEROS: Intellectual Property Guidelines*, 2002

National Office for Research Documentation, Academic and Professional Libraries in Norway, *Copyright issues in higher education and research*, RBT Publication 66A (1995)

BEST COPY AVAILABLE

Report of conference on copyright and universities held on 7-8 June 2001 in Zwolle, Netherlands

C. Oppenheim, 'Copyright in HEIs: A Discussion Paper', in M. Tedd (Ed.), *Papers on copyright issues in the electronic library*, JISC, 1995. Reproduced in: www.jisc.ac.uk/pub/copyright/charles1.htm. Also C. Oppenheim, Copyright and the networking of images, in ibid. One of a series of papers produced for the JISC or its sub-committees to advise on IP management in JISC projects and best practice

W. Rosenblatt, W. Trippe and S. Mooney, *Digital Rights Management: business and technology*, M+T Press, 2002

Twigg, Carol (2002), *Who owns Online Courses and Course Materials: Intellectual Property Policies for a New Learning Environment* (The Pew Learning and Technology Program/ Centre for Academic Transformation, Rensselaer Polytechnic Institute)

Useful web-sites

Association of College and University Policy Administrators web-site, www.inform.umd.edu/acupa/

A Resource on Use of Copyrighted Works for the Higher Education Community, www.umd.edu/copyfair

A Resource on Copyright Ownership for the Higher Education Community, www.umd.edu/copyown

Patent Office web-site, www.patent.gov.uk

JISC Legal Information Service www.jisc.ac.uk/legal

Appendix 2

Summary of responses to invitation to submit evidence

Background

1. HEFCE Circular letter 13/01 was sent on 10 October 2001 to heads of HEFCE-funded higher education institutions and heads of universities in Northern Ireland to invite them to submit evidence to help the group develop best practice guidance in institutional management of IPRs in e-Learning programmes.

2. We asked those responding to focus on the key issues identified by the working group in the following areas:

a. Dissemination of knowledge.
b. Principles of ownership of IPRs.
c. Instruments of effective IPR management.
d. Using third party IP.
e. Collaboration with the private sector and internationally.

3. HEIs were also asked to provide exemplars of best practice guidance that are already used effectively in HEIs. These are not reproduced here.

4. This appendix summarises the 33 responses received from the sector.

General comments

5. The consultation was well received and considered by the majority of institutions to be timely. Few institutions have clear policies and procedures that address all the issues raised when considering the management of IPRs. There is consensus in the sector that the management of IP will become increasingly important.

6. Respondents dwelt particularly on the issue of staff contracts. The interplay between employment rights and IP management was felt to have not been fully addressed in the sector.

7. The issue of use of third party material in e-Learning programmes was thought to be of lesser concern, as it was believed that this was already addressed through existing legislation.

8. Respondents suggested that there was a lack of knowledge about appropriate IP handling in collaborative arrangements and in international markets. They noted that the different legislative arrangements in different countries makes concluding agreements between global partners problematic. A number of institutions commented that an open

access policy should be adopted, similar to that currently used by the Massachusetts Institute of Technology.

9. A large number of respondents raised concerns about publishers and, in particular, that staff sign over copyright to them with little awareness of the implications for the future use of materials by the institution. It was acknowledged that this could be addressed through policy documents and raising awareness among all staff.

10. The issue of quality assurance of e-Learning materials was also raised in many responses, although again it was felt that this could be addressed through current internal quality assurance systems.

Dissemination of knowledge

11. The majority of respondents suggested that there be separation of the rights of ownership from the ability to use materials and assertion of moral rights of authorship. There was consensus that HEIs should own the IPRs in e-Learning materials created by their staff. The justification for this was that individuals would be unable to enforce ownership and defend against litigation because of the expense and complexity in doing so. It was felt that if IP was left to protection by the individual, the quality of material could be compromised and this could in turn detract from the reputation and standing of the institution.

12. On the other hand, respondents felt that individuals should be able to use materials and should be able to retain moral rights of authorship and integrity. A number of institutions drew the Working Group's attention to Sections 79 and 82 of the Copyright, Designs and Patents Act 1988. They interpreted these to mean that if an institution requires staff to assign copyright wholly to the institution, it also technically removes their moral rights to be identified as the author of the work and removes their right to object to derogatory treatment of the work ('right of integrity'). In some cases it was felt that authors' moral rights should be automatically asserted.

13. In the main, respondents regarded lecture notes as the property of the lecturer, as distinct from formal course/module handouts and learning materials. Some institutions expressed the view that academics should retain rights to create traditional publications of textbooks or journal articles, unless these were identical in format to the e-Learning materials.

14. Few respondents directly addressed the question of how to exploit e-Learning assets in a global market. Of those that did, it was generally felt that rights should be respected in all countries that have signed the Berne Convention or the Universal Copyright Convention.

Principles of ownership of IPRs

15. Generally, respondents felt that IPRs can be managed to meet the needs of both staff and HEIs, provided the distinction is made between ownership and authorship. Many respondents presented the concept of a financial reward system for authors, although

BEST COPY AVAILABLE

respondents proposed different systems for reward, including a flat fee for creating e-Learning materials and a risk-sharing operation. Comments on the reward system included:

a. A few respondents argued that institutions take on the risk of product development in e-Learning. Unless staff wish to share the risk, the reward to them by way of commissioning of other fees should be at a flat-rate and not related to investment or later success or failure.

b. The suggestion was raised by one institution that the rewards system should reflect the likelihood of a revenue-generating operation. For example, if some significant transaction occurs relating to IPRs (for example, licensing to another organisation), a 'reward' should not be made for any implied income relating to student use, whether local or through distance learning.

16. The rewards system was also cited as a means to promote the creation and generation of e-Learning materials, which is at its infancy in the majority of institutions.

17. There was some difference of opinion on the rewards for different types of media. For example, several respondents said that IPRs for web-sites and electronic materials should rest with the institution if these related to courses offered by the institution. It was argued that a number of individuals in different areas work closely in a team to produce such materials (for example, IT specialists, academics and administrators). All members of the team may not have an input into creating original materials, but all will be contributing to the development of the e-Learning environment (for example through providing technical support or updating the content of the site). It was hence felt that this formed part of the employee's everyday working role and therefore no financial reward should be offered.

Instruments of effective IPR management

18. There was consensus that policy statements and employment contracts are the major instruments for managing IPRs. A significant number of institutions favoured the creation of a central administrative department within a university which would oversee the management of IP.

19. The majority of respondents agreed that a clear IPR policy statement should be published, agreed and disseminated by the institution in order to promote transparency and avoid possible litigation. It was suggested that such a document should provide guidelines which cover the following:

a. The rationale for HEIs acquiring ownership of IP.

b. Details of any revenue sharing arrangements open to staff.

c. Clarification of ownership when an academic has developed materials and used these in teaching while working at one institution and subsequently left that institution.

d. Sharing of material if a course is to be taught by another member of staff using the author's original materials.

e. Encouraging staff to ensure that all contracts or licences which they sign for publication of their own work include provision for them and their institution to re-use work for a range of purposes which includes e-Learning.

20. Employment contracts were considered by the majority of institutions to be the most effective method of managing IP. Respondents noted that contracts needed to be clear and readily understood, with the scope of duties clearly outlined and with specific provisions related to the generation of materials for use in e-Learning programmes included. A number of respondents agreed that, if staff are commissioned to develop materials for e-Learning programmes over and above their normal work, additional contractual arrangements would be required.

21. A number of HEIs favoured the creation of a central information point within the institution which would exercise overall control over IP issues. Some felt that HEIs need, but generally do not have, specialised internal teams to clear copyright in third party materials to be used in e-Learning materials. This central point could provide advice when setting up contracts and ensure that there is consistency in the approach taken by all departments/faculties within a university. It could also be used to keep the appropriate records and potentially link with other institutions to provide a national records system.

Using third party IP

22. Around half the respondents held the view that third party IP is covered adequately by existing law. The general point made was that e-Learning is not different from any other activity when one is using another's IP. Limited rights are thought to be provided under an existing Copyright Licensing Agency license to use third party materials in paper format, and this will eventually also cover electronic materials where these have originally been developed in an electronic format.

23. Other respondents suggested that difficulties with third party IP lay in identifying the status of any element included in an e-Learning course.

24. The question of the legality of using hyperlinks, without first obtaining the permission of the rights owner, was also raised by one institution.

Collaboration with the private sector and internationally

25. Few institutions were able to provide specific examples of collaboration with the private sector and internationally. However, respondents generally felt that these should be managed through formal contracts. The roles of each party would need to be identified, with particular attention being given to the management of copyright, possibly through the definition of the rights of each to use the copyright material. The question of revenue sharing

was raised, particularly if this is attributed to an individual who later moves to a different institution.

Appendix 3

Model contractual clauses

In all the contracts that follow, there should be cross-references to the HEI's existing contractual clauses that refer to reward systems or arbitration regarding IPR.

A. Model contractual clauses of employment for members of staff

Definitions

1. 'e-Learning Materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.

2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.

3. 'Member of Staff' means academic staff, research associates, technicians, or any other members of staff of the Institution who are employed under a contract of employment (whether fixed term or permanent).

Primary obligation

4. The parties foresee that the Member of Staff may make or discover or create intellectual property in the course of his or her duties under this Agreement and agree that in this respect the Member of Staff has a special duty to further the interests of the Institution.

Title to rights

5. Subject to the provisions of the Patents Act 1977, the Registered Designs Act 1949 and the Copyright, Designs and Patents Act 1988 all IPR in the e-Learning Materials originated by the Member of Staff and arising out of the performance of his/her duties under this Agreement shall be the property of the Institution, and the Member of Staff undertakes to do all acts and things as may be thought by the Institution to be necessary to vest any such property in the Institution and to register title in such property in the Institution.

6. In the event that the Member of Staff fails (for whatever reason) within 30 days of a demand by the Institution to do all acts and things effectively to vest any such property in the Institution, the Member of Staff hereby authorises the Institution in his/her name and on his/her behalf to execute all such deeds or documents as may be necessary or desirable to

transfer such property in the e-Learning Materials to the Institution and register title in the e-Learning Materials in the Institution.

7. If material from other copyright works is included in the e-Learning Materials the Member of Staff shall identify such material to the Institution and shall obtain all necessary written permissions from the owners or from any rights organisation authorised by the owner to grant such permissions in respect of such material. Alternatively the Member of Staff shall, if the Institution so agrees, provide the Institution with sufficient information to enable the Institution to obtain such permissions, but the Institution shall not thereby be obliged to secure such permissions and may require that the Member of Staff omit any such material from the e-Learning Materials.

8. The Institution hereby agrees and acknowledges that all performers' rights in any video or other recording of the Member of Staff's own lectures or presentations or similar works are owned by the Member of Staff. The Member of Staff grants to the Institution and its authorised users an irrevocable royalty-free non-exclusive licence to use such material for administrative, educational, teaching and research purposes.

9. Nothing in this Agreement shall constitute a waiver by the Member of Staff of any moral right under the Copyright, Designs and Patents Act 1988, and nothing therein shall constitute an exclusive recording contract within the meaning of Part II of that Act or consent by the Member of Staff to the exploitation of any qualifying performance for the Purposes of that Part.

Exploitation and income

10. The Institution is free to exploit (whether for financial gain or not) such e-Learning Materials as it sees fit, including licensing or assigning the IPR in the e-Learning Materials to third parties, or merging said e-Learning Materials with other materials created within the Institution or elsewhere.

11. In the event that the Institution fails to exploit the e-Learning Materials within a period of **[to be inserted]**, the Member of Staff or his/her representative may give notice thereof to the Institution, and in such event the Institution shall declare within thirty (30) days in writing whether or not it intends to exploit the e-Learning Materials in the foreseeable future. The Institution agrees it will enter into good faith negotiations with the Member of Staff with a view to assigning its rights in the e-Learning Materials to the Member of Staff if no prospect of commercial exploitation of materials is to be expected. In return, the Member of Staff shall grant the Institution and its authorised users an irrevocable royalty-free licence to use such material for administrative, educational, teaching and research purposes.

12. Should the e-Learning materials prove to be profitable, the Institution agrees that it shall, in accordance with its normal procedures, enter into good faith negotiations with the Member of Staff regarding possible rewards.

BEST COPY AVAILABLE

Credits

13. The Institution agrees to credit the Member of Staff for any significant contribution to the e-Learning Materials. The Institution shall comply with any request by the Member of Staff in writing that his/her name be removed from the e-Learning Materials where such request is on grounds that the whole or parts of the e-Learning Materials are out of date or changed in a manner that might damage his/her reputation.

14. The Institution may update or in any other way amend the e-Learning Materials to suit its requirements. The Institution agrees to consult the Member of Staff over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Permitted uses

15. The Institution grants to the Member of Staff a royalty-free non-exclusive licence to use the e-Learning Materials created by the Member of Staff or jointly with others for non-commercial teaching or research purposes only for as long as the Member of Staff remains employed by the Institution. Such licence may continue after the termination of this Agreement provided that the use of the e-Learning Materials does not damage the Institution's exploitation of the materials or prejudice in any way the interests of the Institution.

16. Should the contract of employment of the Member of Staff terminate, the Member of Staff shall be entitled to enter into negotiations with the Institution with a view to permitting the Member of Staff to make and retain a copy of the e-Learning Materials for his/her use for non-commercial teaching and research purposes. In the case of disagreement over these negotiations, Dispute Settlement procedures in accordance with Clause 22 of this Agreement shall be invoked. Neither the Member of Staff nor his/her new employer is permitted to commercially exploit the e-Learning Materials without the express permission of the Institution.

17. Nothing herein shall grant to the Member of Staff any right or licence to copy or use any versions of the e-Learning Materials updated or in any way amended by the Institution after termination of the employment whose terms and conditions are governed by this Agreement.

Prohibited uses

18. The Member of Staff is not permitted to assign or enter into any licence for the exploitation of the e-Learning Materials. In the event that the Member of Staff becomes aware of any third party wishing to exploit the e-Learning Materials such third party shall be advised by the Member of Staff to contact the Institution as the owner of the IPR in the e-Learning Materials.

Rights in other material

19. Save as provided hereafter, the Institution agrees and recognises that the IPR in Texts shall be vested in the Member of Staff. Texts means textbooks and academic articles and works of a similar nature other than e-Learning Materials created through the intellectual effort of the Member of Staff in the course of employment. Texts are not confined to words, but could include images or other media. The Member of Staff grants to the Institution and its authorised users an irrevocable royalty-free non-exclusive licence to use the Texts for administrative, educational, teaching and research purposes.

20. If Texts are to be used in e-Learning Materials, IPRs in Texts shall not be assigned or licensed by the Member of Staff on an exclusive basis to any third party unless provision is made for the Institution to use such materials for teaching and research purposes without charge.

Termination

21. Save as provided herein, all rights and obligations under this Agreement shall continue to be in force after the termination of the employment whose terms and conditions are governed by this Agreement in respect of all IPR in the e-Learning Materials originated by the Member of Staff during the Member of Staff's employment under this Agreement, and shall be binding on his/her representatives.

Dispute settlement

22. Any dispute between the parties arising out of or in connection with this Agreement, except as otherwise provided in this Agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties, within thirty (30) days after a request for a reference is made by either party, nominated on the application of either party by the Chairman for the time being of the Bar Council [but see also definition of 'arbitration' in Section D of the Report].

[There might be a reversion of rights clause also inserted. HEIs should allow for the possibility of reversion of rights if, should the HEI choose not to exploit the materials commercially, the individual or team that developed the materials wishes to take on the exploitation of the materials. Negotiations should be entered into in good faith and should be based on the premise that the HEI should not unreasonably refuse the individual or the team the IPR if the HEI has no interest in exploiting the materials. Appropriate arbitration procedures should be in place in case of disagreement. In return for the acquisition of the IPR, the member of staff should always grant his/her employer and its authorised users a royalty-free licence to use the materials for administrative, educational, teaching or research purposes. Any such clause should forbid the individual from exploiting the material in a way that the HEI in its reasonable opinion deems to be competitive to its own activities.]

BEST COPY AVAILABLE

B. Model contractual clauses for freelancers

Definitions

1. 'e-Learning Materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.

2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.

3. 'Freelancer' means an individual or organisation working for the Institution other than under a contract of employment.

Title to rights

4. All IPR in the e-Learning Materials conceived or made by the Freelancer in the course of providing the services are assigned to the Institution. Wherever requested to do so by the Institution, the Freelancer will at the Institution's expense execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

Exploitation and income

5. The Institution is free to exploit (whether for financial gain or not) the e-Learning Materials as it sees fit, including licensing or assigning the IPR in the e-Learning Materials to third parties, or merging said e-Learning Materials with other materials created within the Institution or elsewhere.

Credits

6. The Institution agrees to credit the Freelancer for any significant contribution to the e-Learning Materials. The Institution shall comply with any request by the Freelancer in writing that his/her name be removed from the e-Learning Materials where such request is on the grounds that whole or parts of the e-Learning Materials are out of date or changed in a manner that might damage his/her reputation.

7. The Institution may update or in any other way amend the e-Learning Materials to suit its requirements. The Institution agrees to consult the Freelancer over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Prohibited uses

8. The Freelancer is not permitted to assign or enter into any licence for the exploitation of the e-Learning Materials. In the event that the Freelancer becomes aware of any third party wishing to exploit the e-Learning Materials such third party shall be advised by the Freelancer to contact the Institution as the owner of the IPR in the e-Learning Materials.

Termination

9. Save as provided herein, all rights and obligations under this Agreement shall continue to be in force after the termination of this Agreement in respect of all IPR in the e-Learning Materials originated by the Freelancer during this Agreement and shall be binding on his/her representatives.

Dispute settlement

10. Any dispute between the parties arising out of or in connection with this Agreement, except as otherwise provided in this Agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, nominated on the application of either party by the Chairman for the time being of the Bar Council [but see also definition of 'arbitration' in Section D of the Report].

C. Model contractual clauses for students

Definitions

1. 'e-Learning Materials' means any materials created within the Institution or created on behalf of the Institution that are primarily intended (whether by the Institution or by some third party) to be used in digital form by students at any level, for the purposes of any course of study those students are following.

2. 'IPR' means patents, trademarks, trade names, design rights, copyright, confidential information, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for the grant of any of the foregoing and all rights or forms of protection having equivalent or similar effect to any of the foregoing which shall subsist anywhere in the world.

3. 'Student' means any person registered as an undergraduate or postgraduate student of the Institution or following any course as if such a student.

Title to rights

4. The Student has agreed to assign all interests in the IPR in the e-Learning Materials originated by the Student to the Institution. The Student wherever requested to do so by the

Institution, should (at the Institution's expense) execute any and all applications, assignments or other instruments which the Institution deems necessary to give effect hereto.

Exploitation and income

5. The Institution is free to exploit (whether for financial gain or not) e-Learning Materials as it sees fit, including licensing or assigning the IPR in the e-Learning Materials to third parties, or merging said e-Learning Materials with other materials created within the Institution or elsewhere.

6. Should the e-Learning materials prove to be profitable, the Institution agrees that it shall enter into good faith negotiations with the Student regarding possible rewards.

Credits

7. The Institution agrees to credit the Student for any significant contribution to the e-Learning Materials. The Institution shall comply with any request by the Student in writing that his/her name be removed from the e-Learning Materials where such request is on the grounds that the whole or parts of the e-Learning Materials are out of date or changed in a manner that might damage his/her reputation.

8. The Institution may update or in any other way amend the e-Learning Materials to suit its requirements. The Institution agrees to consult the Student over any significant amendments without any obligation to be bound by the same in deciding on the final form or content of such amendments.

Permitted uses

9. The Institution grants to the Student a royalty-free non-exclusive licence to use the e-Learning Materials created by the Student or jointly with others for non-commercial teaching or research purposes only for the duration of the Student's period of registration or course of study at the Institution, at the conclusion of which this Agreement shall be treated as having terminated. Such licence may continue after the termination of this Agreement provided that the use of the e-Learning Materials does not damage the Institution's exploitation of the materials or prejudice in any way the interests of the Institution.

10. The Student is allowed to make and retain a single copy of the e-Learning Materials for his/her use for non-commercial teaching and research purposes after the termination of this Agreement.

11. Nothing herein shall grant to the Student any right or licence to copy or use any versions of the e-Learning Materials updated or in any way amended by the Institution after termination of this Agreement.

Prohibited uses

12. The Student is not permitted to assign or enter into any licence for the exploitation of the e-Learning Materials. In the event that the Student becomes aware of any third party wishing to exploit the e-Learning Materials such third party shall be advised by the Student to contact the Institution as the owner of the IPR in the e-Learning Materials.

Termination

13. Save as provided herein, all rights and obligations under this Agreement shall continue to be in force after the termination of this Agreement in respect of all IPR in the e-Learning Materials originated by the Student during this Agreement and shall be binding on his/her representatives.

Dispute settlement

14. Any dispute between the parties arising out of or in connection with this Agreement, except as otherwise provided in this Agreement, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties or, failing agreement between the parties within thirty (30) days after a request for a reference is made by either party, nominated on the application of either party by the Chairman for the time being of the Bar Council [but see also definition of 'arbitration' in Section D of the Report].

BEST COPY AVAILABLE

Appendix 4

Summary of responses to limited 'expert' consultation

Background

1. The Working Group requested that an initial consultation be held on its draft report with selected expert bodies, including the memberships of Universities UK and SCOP.

2. It was intended that the first stage consultation would confirm that the Working Group's proposals are as robust as possible given the complexity of the issues raised in their inquiry.

3. The expert bodies were asked to provide their organisation's overall view on the draft report, and in particular whether it provides robust guidance for the higher education sector in managing IPRs in e-Learning programmes.

4. This report summarises the 11 responses from the expert bodies. Comments in square brackets reflect the changes made by the Working Group in its report in response to the consultation.

General comments

5. The majority of respondents were generally content with the scope and detail of the draft report, which was welcomed. It was felt that the guidance would raise awareness of the complexity of issues and encourage individual HEIs to ensure clarity in relation to both employment contracts with individual academic staff and the development of institutional policies relating to the production of e-Learning materials by those within their employ.

6. There was considerable support to expand the remit of the group to look at the management of IPRs in an international framework and that such guidelines should contribute to a better understanding of the international differences in legislation and cultural attitudes with respect to intellectual property. Identifying best practice in relation to private sector partnerships would also be beneficial, with advice about, and tangible examples of, how to commercialise e-Learning programmes.

7. Comments made on the draft report in general were:

   a. The majority of those responding considered that further guidance on copyright, patents and third party material is required. There should be increased emphasis on the need to improve significantly the expertise within HEIs, and that all staff, not just new starters, will need to be educated on IP issues. [Comment: we have stressed this in our report in response and are pleased that JISC is taking this up.]

   b. Some respondents felt that the draft report dwelt too heavily on academic staff, rather than the range of contributors such as publishers, freelancers and students.

There were concerns that the practices recommended might constrain collaborative arrangements. [Comment: we have clarified that all staff are covered, including that students should be treated as staff if they are so acting. We recognise that there are differences of view between different parties on how constraining these recommendations may be.]

c. One organisation suggested that the report should flag the need for more general business policies within the HEI on matters such as licensing, copyright and arbitration procedures to apply if a dispute arise. It was also considered that the respective liabilities of institutions and individuals need to be clarified and that it would be beneficial to explain this in detail. [Comment: we have flagged in the report the need for HEIs to cross-refer to their own institutional policies if they adopt the clauses we have proposed.]

d. Some respondents felt that the document goes too far in forbidding academics from assigning copyright or licensing rights. The view was also given that no alteration of materials should take place without the express permission of the author. [Comment: We have drawn a distinction between e-Learning materials and scholarly works which we hope helps ensure that HEIs can exploit e-Learning as an activity, but also does not impede the dissemination of knowledge. In practice, there are complex boundaries (for example, between textbooks and e-Learning materials). We hope we have made a fair balance between the interests of various parties. It would be impracticable to recommend that no alterations were made without the author's permission, but we have proposed that authors should be asked about significant change.]

e. On reward systems, some respondents recommended that the report propose that the terms of particular contracts and sharing ratios be negotiated on a case-by-case basis within an indicative framework (for example, institution by institution, department by department, and project by project), rather than necessarily within the contract of employment. [Comment: probably not feasible to negotiate on a case-by-case basis, but we have reflected that the HEI should have standard terms and might negotiate further if there was significant revenue.]

f. Some respondents questioned whether it is practical for all students to sign a contract with the HEI upon registration or re-enrolment. [Comment: our proposals are consistent with the approach recommended in the UUK/AURIL report; the signing of contracts is voluntary.]

g. A minority suggested that provisions on use of IPRs for freelancers and by staff when leaving the HEI are too restrictive. [Comment: we have amended our report to reflect that this should only apply if significant use is anticipated.]

h. A number of respondents considered that digital management systems were not sufficiently understood and that further explanation of these systems and their possible uses should be included in the report. [Comment: we added some explanation.]

8. The following points were made on the definitions:

a. e-Learning materials: The definition of e-Learning materials is considered by many to be too open. The question of whether this includes materials originally created in non-digital form but then made available digitally was raised, and respondents suggested that this should be clarified in the final draft. Similarly it was noted that the Preface indicates that guidance is not intended to apply to IPR associated with articles written for scholarly research journals. However the definition of e-Learning materials, as drafted in the first clause in Appendix 3, does not make any such distinction. It is felt that this disjunction needs to be addressed. [Comment: We have amended to ensure consistency of approach throughout.]

b. 'Assign' and 'Licence': These were considered by one respondent to be two important terms within the draft report that should be spelled out in the 'Definitions' section, for example, in explaining what a licence to staff does and does not cover. [Comment: we provide a reference to a legal text, *Intellectual Property Law,* in the bibliography that can help those with less familiarity with legal terms.]

c. 'Arbitration': It was suggested that this also requires a clear definition. [Comment: we have added more explanation on what we mean by arbitration.]

d. The definitions such as 'staff' could be seen to exclude students who do some teaching. [Comment: we have clarified this.]

9. There were the following points on the Principles and Appendices:

a. Principle 1: This needs to be amended to reflect the principle that IPR in e-Learning materials automatically falls to the institution only where such material is created at the prompting of, or agreement with, the institution. Where it falls into the category of 'personal' materials, as identified in the post-1992 HEIs contractual clauses, the IPR will remain with the individual, although the individual must abide by the institution's requirements with respect to placing material on the intranet or internet. Where there is disagreement or uncertainty as to the status of the materials the matter should be subject to the institution's arbitration procedures. [Comment: we have added that HEIs will need to take account of existing policies and agreements, such as those in place in post-1992 universities, in adopting the approach taken in our report.]

b. Principle 6: A clause should be inserted in the model contractual clauses stipulating that agreement will need to be reached on any reward for the work in question. The question was raised as to whether this should relate to IPRs of both staff and students and that, if so, it should be expressed as doing so. [Comment: We amended clause.]

c. Appendix 3: Paragraph 7 line 3 should be amended to 'from the owners or from the reprographic rights organisation authorised by the owners to grant such

BEST COPY AVAILABLE

permissions in respect of such material ' – this would include the Copyright Licensing Agency and the Copyright Licensing Agency Rapid Clearance Service. [Comment: we amended it.]

10. Other points made were:

a. One respondent drew the Working Group's attention to the clauses in the national contract for lecturers in the post-1992 HEIs dealing with copyright. Although many institutions have supplemented clauses with more extensive policies on IPR issues, the basic contractual position set out in these clauses with respect to e-Learning materials should be scrutinised to ensure they do not conflict with these existing clauses on copyright. These clauses are considered to give copyright to the individual in 'scholarly work' – including items such as books, articles and conference papers. [Comment: we have reflected the need for HEIs to consider our recommendations in light of their existing agreements.]

b. The report should also note that students learning via an online course need traditional publications to support them, and that these guidelines should not inhibit the creation of such material by academic staff. [Comment: we agree that students also need publications and we intend that our report should not impede this.]

c. The cost of arbitration was also stressed by a number of organisations, with the overriding view that although it is recommended it can be costly and time-consuming and could easily exceed the value of IP, and that therefore a common-sense approach should be recommended. [Comment: we have set out what we mean by arbitration and that it need not be costly.]

Appendix 5

Sample consortium agreement for multi-partner collaborative R&D projects

THIS AGREEMENT is made the _____day of _____ 200X BETWEEN

THE UNIVERSITY OF ENGLAND of ..... and

THE UNIVERSITY OF NORTHERN IRELAND of ..... and

THE UNIVERSITY OF SCOTLAND of ..... and

THE UNIVERSITY OF WALES of .....

(hereinafter referred to individually as a '**Party**', collectively or in groups as '**Parties**')

INTRODUCTION:-

A. The Parties to this Agreement wish to undertake a project entitled 'e-Learning materials'.

B. The Parties intend to carry out a programme of work which is described in **Annex 1** [not attached] (hereinafter referred to as the '**Project**').

C. The [ ] year Project will involve the development of [ ] and the production of [ ] (hereinafter referred to as '**Deliverables**'). It is envisaged that the Deliverables may be further developed after the end of the Project and that such further development may lead to the production of additional materials (hereinafter referred to as '**Products**').

This Agreement sets out the details of the relationship between the Parties.

IT IS HEREBY AGREED AS FOLLOWS:-

1 Purpose of the Consortium

The purpose of the Consortium is to carry out the Project and to produce Deliverables as described.

2 Commencement and duration

The Consortium was formed and the Project commenced with an effective date of..... and the Project has a duration of [ ] years, unless otherwise agreed in writing by the Parties.

3 Project resources

The total funding for the Project is as follows:-
Year 1 - £[ ] Year 2 - £[ ] Year 3 - £[ ]..... Total - £[ ]
and the budget shall be apportioned between the Parties in accordance with the schedule detailed in **Annex 2** [not attached].

4 Project management

4.1 Identification

The Parties agree that the Project lead site is The University of England. The Parties agree that the Project will be managed by Professor [ ] of the University of England ('**Project Manager**'). The Project Manager will report to a group established by the Consortium and made up of [ ] ('**the Steering Group**'). The Chairman of the Steering Group is the Deputy Vice-Chancellor of the University of England ('**Chairman**'). The nominated individuals are listed in **Annex 3** [not attached].

4.2 Responsibilities of the Project Manager

The Project Manager will have responsibility for the day-to-day management of the Project, with the Steering Group being concerned with overall policy and direction. The Parties agree that the Project Manager will have the following responsibilities: [ ]

4.3 Responsibilities and activities of the Steering Group

The Steering Group will determine the overall nature of the Product and will maintain responsibility for determining the technical standards to be adopted in the Project. The Steering Group will determine the academic content of the Product. The Steering Group will meet at least [ ] times a year. Additional meetings may be called by two or more Parties or on the advice of the Project Manager. The Steering Group may choose to take advice from third parties, as is required. Meetings of the Steering Group will operate under the following rules:

- the Project Manager will notify Steering Group members of the dates of meetings and outline agenda with at least fourteen days notice
- each Steering Group member will have one vote, except the Chairman who has a casting vote. However, a member may not vote on matters concerning a dispute with the Consortium where the member is the subject of the dispute
- Steering Group members may nominate a representative to attend meetings and vote on their behalf

- decisions will be taken on the basis of a majority vote of those attending and eligible to vote
- the minimum number of voting members required for meetings is [ ].

4.4 The responsibilities of the chairman

To act as chairman of the Steering Group.

4.5 Responsibilities of the parties

Each Party undertakes to use all reasonable endeavours to:
- perform on time the tasks and work packages assigned to it under the schedules shown in **Annex 4** [not attached]
- participate actively with other Parties where necessary
- promptly notify the Project Manager of any delay in performance
- prepare and present reports as required.

4.6 Changes in membership of the consortium

Institutions may be invited to join the Consortium only by the unanimous decision of the Steering Group and on the condition that the new institution becomes a Party to this Agreement. A Party may withdraw from the Consortium only in the event of irremediable breach of any Clause in this Agreement and with the unanimous agreement of the remaining Parties. In the event of withdrawal or expulsion, the remaining members of the Consortium will only be liable to meet the cost of any work undertaken up to the point at which an institution ceases to be a member of the Consortium. The balance of any payments made to the Party will be returned to the Project Manager within 30 days of withdrawal or expulsion. In all cases, the Consortium reserves the right to acquire (both in physical form and in the form of assignment to it of any relevant Intellectual Property Rights) any work produced as a result of the Project.

5 Data management

5.1 Data collection

In the course of the Project, each party is involved in the collection of data in the form of [ ]. The data are to be sent to the Project Manager and stored in an archive at [ ] (**'the Project Archive'**). Each Party agrees to ensure that all data submitted to the Project Manager are accompanied by documentation detailing the origin of the data, together with any necessary ethical consent. [Each data collection must be accompanied by a signed copy of the copyright form as shown in **Annex 5** [not attached]]. The Project Manager undertakes to ensure that all data stored in the Project Archive are referenced to the associated copyright documentation stored as part of the Project Archive.

BEST COPY AVAILABLE

5.2 Data maintenance

The University of Wales hereby undertakes to maintain the Project Archive for the duration of the Project and for a period of at least [ ] years after the end of the Project. This period is subject to extension if the Steering Group so decides.

6 Confidentiality

Each Party hereby undertakes to the other Party that it shall procure that its employees, agents and students shall:

a. keep confidential all information of a confidential nature (whether written or oral) concerning this agreement and the business affairs of any other Party that it shall have obtained or received as a result of the discussions leading up to or entering into or performance of this agreement (the '**Information**');

b. not without the prior written consent of the relevant other Party disclose the Information, either in whole or in part, to any other person save those of its employees, agents and students involved in the implementation or evaluation of the Research who have a need to know the same for the performance of their duties; and

c. to use the Information solely in connection with the implementation of the Research and not otherwise for its own benefit or the benefit of any third party.

The provisions a, b and c above shall not apply to the whole or any part of the Information to the extent that it can be shown by the receiving Party to be:

i. Known to the receiving Party prior to the date of this agreement and not obtained directly or indirectly from any other Party; or

ii. Obtained from a third party who lawfully possesses such Information which has not been obtained in breach of a duty of confidence owed to any Party by any person; or

iii. In the public domain in the form in which it is possessed by any other Party other than as a result of a breach of a duty of confidence owed to such other Party by any person; or

iv. Required to be disclosed by legal process, law or regulatory authority.

Each Party hereby undertakes to the other Party to make all relevant employees, agents and students aware of the confidentiality of the Information and provisions of this Clause 6 and without prejudice to the generality of the foregoing to ensure compliance by such employees, agents and students with the provisions of this Clause 6.

7 Intellectual property

7.1 Ownership

With regard to the ownership of intellectual property, the Parties agree as follows:

- the Party generating the Material shall own all Materials not incorporated into a Deliverable.
- all Deliverables, and the Materials contained therein, not incorporated into a Product shall be owned jointly by all the Parties.
- any Product shall be owned by one Party and the Steering Group will decide which Party shall own a Product on a case-by-case basis

Each Party shall obtain the necessary assignments of intellectual property rights (this term includes, but is not limited to, copyright, database right, patents and trademarks) from all staff, students or agents involved in the development and production of the Deliverables on its behalf. Each Party warrants to the other Parties that it is the owner of the copyright and/or database rights in the Deliverables or that it is duly licensed to use the Deliverables and that the content of the Deliverables used as contemplated in this Agreement does not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person.

Each Party shall indemnify and hold the other Parties harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any actual or alleged infringement of such rights.

This indemnity shall survive the termination of this Agreement for any reason.

7.2 Marking

The Parties agree that all Deliverables and Products shall be clearly marked identifying that the copyright is owned by [ ]. The Parties agree that the Steering Group will produce a suitable form of words acknowledging the involvement of the Parties and the ownership of the copyright, which shall appear on all copies of the Deliverables and Products.

7.3 User rights

Each Party hereby grants to the other Parties a non-exclusive indefinite free licence to use the Deliverables and Products for the purposes of carrying out the Project and for teaching and research purposes during the Project and after the end of the Project. The Parties hereby agree to grant to each other and to third parties such non-exclusive licences as are necessary to enable the exploitation of the Deliverables and the development and creation of Products in accordance with the provisions of this Agreement.

8 Commercial exploitation

8.1 Procedures

In addition to the free licences granted in Clause 7.3 above, the Parties agree that they shall endeavour to exploit commercially the Deliverables and Products world-wide. The parties agree that a special meeting of the Steering Group will be held at the end of the Project and also one year before the end of the Project in order to discuss the potential for the commercial exploitation of the Deliverables and Products. At these meetings, the Steering Group shall review the Deliverables and shall discuss the potential for exploitation and the potential for development of Products from the Deliverables. The Steering Group will agree upon a strategy for exploitation.

8.2 Exploitation income sharing

Income derived from exploitation of Deliverables shall be received by and allocated to an account within the finance office of the Party responsible for the generation of the income. Where more than one party is involved, the Parties shall agree among themselves on procedures for receipt of income.

After the deduction of all relevant expenditure and costs associated with exploitation, the remaining income derived from commercial exploitation shall be divided as follows:

x%, y%, z%

The Parties agree that the sharing of revenue applies to those Parties remaining at the end of the Project. If a Party resigns or is expelled prior to the completion of the Project their entitlement to a share in the income derived from commercial exploitation will be determined by the Steering Group and will take account of the proportion of the total Project undertaken by that Party.

9 Publication and press releases

Procedures for publications and press releases relating to the Project shall be agreed between the Parties through the Steering Group.

10 Liability

The work associated with the Project will be carried out by each Party in accordance with the highest academic standards, and reasonable endeavours will be made to achieve the degree of reliability and accuracy appropriate to work of this kind. However, no Party has control over the use to which other Parties may put the results of the work, and each Party will therefore be deemed to have satisfied itself in every respect as to the suitability and fitness of the work for any particular purpose or application. To the extent permitted by law, no Party, its servants or agents accept any liability, however caused, arising from any error or

BEST COPY AVAILABLE

inaccuracy in any opinion, advice, report or deliverable arising from this work nor for any resulting damage, loss expenses or claim, except to the extent that such can be shown to be caused by the wilful negligence of the Party.

11 Miscellaneous

Assignment: No party will be entitled to assign this Agreement nor all or any of their rights and obligations hereunder without the prior written consent of the others.

Disputes/arbitration: All disputes or differences which will at any time hereafter arise between the Parties in respect of the construction or effect of this Agreement or the rights, duties and liabilities of the parties hereunder, or any matter or event connected with or arising out of the Project, will be referred in the first instance to the Steering Group. If the Steering Group is unable to resolve the dispute, the Chairman shall select an independent third party to act as arbitrator.

Relationship: Nothing in this Agreement will create or be deemed to create a partnership or the relationship of employer and employee between the Parties.

Law and jurisdiction: This Agreement will be governed by the laws of England. This Agreement is subject to the exclusive jurisdiction of the English courts to which the parties hereto submit. This clause does not prevent a party from seeking interim relief in any court of competent jurisdiction.

Indemnity: Each Party represents and warrants to the other Parties that publication or distribution of those parts of the Deliverables that it has contributed will not contravene any laws, including but not limited to the laws of defamation and contempt of court (or concepts approximating thereto). Each Party shall indemnify and hold the other Parties harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any illegality. Any Party shall promptly inform the others of any illegality or alleged illegality upon the party becoming aware of the same. This indemnity shall survive the termination of this Agreement for any reason.

AGREED BY THE PARTIES through their authorised signatories

For and on behalf of THE UNIVERSITY OF ENGLAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF NORTHERN IRELAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF SCOTLAND:

..... Date .....

Name: .....

For and on behalf of THE UNIVERSITY OF WALES:

..... Date .....

Name: .....

List of abbreviations

AURIL	Association for University Research & Industry Links
DRM	Digital rights management
HE	Higher education
HEFCE	Higher Education Funding Council for England
HEI	Higher education institution
IP	Intellectual property
IPRs	Intellectual property rights
JISC	Joint Information Systems Committee
SCOP	Standing Conference of Principals
TLTP	Teaching and Learning Technology Programme
UUK	Universities UK

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

[X] This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

[ ] This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").